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No. 82-677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PHILLIPS CRANE & RIGGING OF SAN ANTONIO, INC., and DELMAR PHILLIPS,
Appellants,

v.

BEN B. SHAW and RUDY GARZA, as Tax Assessor-Collector of Bexar County, Texas
Appellees.

On Appeal from the Supreme Court of Texas

BRIEF FOR QUERNER TRUCK LINES, INC. AS AMICUS CURIAE

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF QUERNER TRUCK LINES	1
ARGUMENT	3
The Decision Below Misinterprets Texas Authority with Respect to the Availability of a Tax Refund Suit Because, Prior to the Dicta in the Decision Below, No Suit for a Refund of Personal Property Has Ever Been Recognized	3
Even if a Refund Suit Could Be Brought, the Unreviewable Seizure Cuts Off the Valid Defense of Limitations	9
Were a Refund Suit Otherwise Available, It Could Not Constitute the Adequate Post-Seizure Review Required By Due Process	10
CONCLUSION	13

TABLE OF AUTHORITIES

Cases	Page
Adams v. Harris County, 316 F. Supp. 938 (S.D. Tex. 1970), *rev'd on other grounds*, 452 F.2d 994 (5th Cir. 1971), *cert. denied*, 406 U.S. 968 (1972)	5
Angelina County v. Kent, 374 S.W.2d 313 (Tex. Civ. App. 1963)	6
Austin National Bank v. Shepard, 123 Tex. 272, 71 S.W.2d 242 (1934)	8
Bullock v. Amoco Production Co., 606 S.W.2d 899 (Tex. 1980)	9
Cobb v. Herrington, 144 Tex. 360, 190 S.W.2d 709 (1945)	6
Commissioner v. Shapiro, 424 U.S. 614 (1976)	9, 12
Crow v. City of Corpus Christi, 146 Tex. 588, 209 S.W.2d 922 (1948)	3
Galveston County v. Galveston Gas Co., 72 Tex. 509, 10 S.W. 583 (1889)	4
Galveston Gas Co. v. County of Galveston, 54 Tex. 287 (1881)	4
Jernigan v. Findley, 90 Tex. 205, 38 S.W. 24 (1896)	8
Laidlaw Bros. v. Marrs, 114 Tex. 561, 273 S.W.2d 789 (1925)	8
Laing v. United States, 423 U.S. 161 (1976)	12
Mills v. Habluetzel, _____ U.S. _____, 102 S. Ct. 1549, 72 L. Ed.2d 770(1982)	10
Morris v. Smiley, 378 S.W.2d 149 (Tex. Civ. App. 1964)	8
National Biscuit Co. v. State, 134 Tex. 293, 135 S.W.2d 687 (1940)	8
North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975)	12
Phillips v. Commissioner, 283 U.S. 589 (1931)	10
Procter & Gamble Distributing Co. v. Sherman, 2 F.2d 165 (S.D.N.Y. 1924)	7, 11
Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981)	11, 12
State v. Connecticut General Life Insurance Co., 382 S.W.2d 745 (Tex. 1964)	9
State v. Lain, 162 Tex. 549, 349 S.W.2d 579 (1961)	8
Texas International Airlines, Inc. v. Texas Alcoholic Beverage Comm'n, 566 S.W.2d 693 (Tex. Civ. App. 1974)	9
United States v. Livingston, 179 F. Supp. 9 (E.D.S.C.), *aff'd per curiam*, 364 U.S. 281 (1960)	11
W.D. Hayden Co. v. Dodgen, 158 Tex. 74, 308 S.W.2d 838 (1958)	6

Statutes and Rules

TEX. TAX CODE ANN. § 33.05(a) 2
TEX. TAX.-GEN. ANN. art. 1.05 7
TEX. TAX.-GEN. ANN. Art. 1.11A 7
TEX. REV. CIV. STAT. ANN. art. 1573 5
TEX. REV. CIV. STAT. ANN. Art. 7254 7
TEX. REV. CIV. STAT. ANN. art. 7266 2
TEX. REV. CIV. STAT. ANN. art. 7298 2
TEX. R. CIV. P. 94 5

Other Authorities

Comment, *The Governmental Immunity Doctrine in Texas — An Analysis and Some Proposed Changes*, 23 *SW. L.J.* 341 (1969) 5
TEXAS PRACTICE — PROPERTY TAXES § 622 (J. Howell ed., 1975) 7

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v.

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BRIEF FOR QUERNER TRUCK LINES, INC. AS AMICUS CURIAE

This proceeding seeks a review of the Supreme Court of Texas holding a state tax seizure statute constitutional. The suit was initially brought by the appellants, Phillips Crane & Rigging of San Antonio, Inc., and Delmar Phillips ("Phillips") against Ben B. Shaw, the Tax Assessor-Collector of Bexar County, Texas ("the collector"). From that adverse decision, this appeal has been taken.

INTEREST OF QUERNER TRUCK LINES

Earlier on the day that Ben B. Shaw seized assets belonging to Phillips Crane & Rigging for allegedly delinquent taxes, he levied upon, seized and took into possession equip-

ment belonging to Querner Truck Lines, Inc. The collector alleged that Querner owed more than $17,000 worth of taxes, dating back to 1960. Just as in the Phillips case, Shaw had previously brought a tax suit against Querner which was still pending at the time of the seizure and remains pending today.[1] Shortly after Phillips brought its action against Shaw, Querner brought a similar action by way of counterclaim in the tax suit.[2] Querner additionally set up as a defense the appropriate statute of limitations, barring suits for the recovery of taxes more than four years delinquent.[3] Phillips alone sought and obtained a permanent injunction from the state district court which was subsequently appealed by Shaw to the Supreme Court of Texas.[4] That court reversed, holding the tax seizure statute constitutional under the Fourteenth Amendment, and Phillips has brought this appeal.

Querner has a direct interest in the outcome of this litigation because its property is also subject to sale through the questioned seizure. If the opinion below is affirmed, there will be a direct and adverse effect upon Querner and its property.

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[1]The suit was cause number 80-TA1-487 in the 45th Judicial District Court of Bexar County, Texas, and was filed on January 31, 1980.

[2]For a time in the lower courts, the Querner action was consolidated with that of Phillips. [J.S. App. 21, 8a]

[3]*TEX. REV. CIV. STAT. ANN.* art. 7298 (Vernon 1960) provides in revelant part "that no suit shall be brought for the collection of delinqent personal property taxes of any taxing authority unless instituted within four (4) years from the time the same shall become delinquent." Like art. 7266, this provision was repealed by the new Texas Tax Code, effective Jan. 1, 1982. That new code not only carries forward the four-year limitations period for filing suit, but also bans seizures for taxes barred by limitations: "Personal property may not be seized and a suit may not be filed: (1) to collect a tax on personal property that has been delinquent for more than four years". *TEX. TAX CODE ANN.* § 33.05(a) (Vernon 1981).

[4]Querner participated in that proceeding as an amicus curiae.

Querner, as an amicus curiae, is also concerned that this Court should be aware of the ramifications the decision below has with respect to allowing the state to collect taxes by seizure that it could not recover through litigation. This point is not present in the Phillips case, but has a direct and important bearing on the over-all question of the constitutional validity of the Texas statute here involved. For these reasons, Querner Truck Lines has obtained the permission of the parties to file this brief and present its views on the instant case to this Court.

ARGUMENT

This case presents the Court with the opportunity to determine whether or not a state tax collector may, consistent the due process clause of the Fourteenth Amendment, seize and sell personal property without judicial supervision of any kind. This Court has never determined the important issue squarely presented by this appeal.

The Decision Below Misinterprets Texas Authority with Respect to the Availability of a Tax Refund Suit Because, Prior to the Dicta in the Decision Below, No Suit for a Refund of Personal Property Taxes Has Ever Been Recognized.

In an effort to demonstrate that a tax refund suit is allowed and is not one against the state requiring legislative permission, the court below has cited four cases. [J.S. App. 4a] These authorities do not establish the proposition for which they are cited; on the contrary, none of them specifically addresses the question of whether a tax refund suit is permitted without legislative permission. Three of these cases, in fact, did not involve state taxes at all.

Crow v. City of Corpus Christi, 146 Tex 588, 209 S.W.2d 922 (1948), was a declaratory judgment suit against a city to invalidate a taxation ordinance. Coupled with that declaratory judgment action was one for a refund of taxes paid to the city. The court found the ordinance unconstitutional and duly invalidated it. A refund was then allowed

and the only issue before the supreme court was whether the taxes were paid under duress. Recognizing the general rule that one who voluntarily pays even an illegal tax may not have it refunded, the court found that implied duress was present and that therefore the taxes had not been voluntarily paid.

Both the opinion of the supreme court and that of the court of civil appeals in *Crow* were silent as to any issue of sovereign immunity. The record in that case revealed that a refund application was apparently presented to the city council. Although the record was not clear as to whether such a procedure was a prerequisite to suit under applicable city charter provisions, it is beyond cavil that a defense of sovereign immunity was never raised in nor ruled upon by the courts.

A similar situation is true with respect to the third case cited by the court below, *Galveston Gas Co. v. County of Galveston,* 54 Tex. 287 (1881). There the suit was against a county for a refund of taxes collected by and for the benefit of the local governmental body rather than for the state. The court's opinion, as well as that on the subsequent appeal,[5] is silent on the issue of governmental immunity. Neither was the issue raised by the pleadings in the district court.

Because these cases do not address, even peripherally, the question of sovereign immunity, it is engaging in dangerous speculation to suggest that they are authority for the proposition for which they are cited. To the extent that the decision below has stated that they so stand, that court has, in dicta, rendered an advisory opinion. This is particularly true since the holdings in these two cases may be reconciled with the taxpayer's position that a suit for a refund of state taxes necessarily requires legislative permission.

It should be noted that sovereign immunity, like any

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[5]*Galveston County v. Galveston Gas Co.,* 72 Tex. 509, 10 S.W. 583 (1889).

other affirmative defense, can be waived by failure to plead it.[6] Not been pled, it cannot be said that the court had an opportunity in either case to examine the issue.

There is also a Texas statute which constitutes a limited waiver of a county's governmental immunity.[7] Suit may be brought on a non-tort claim is presented to the commissioner's court for payment which is not allowed even though

> [t]heoretically, counties enjoy the same degree of immunity as the state. However, the rule granting to the county immunity from suit has been abrogated by the Legislature [citing article 1573]. Thus, the courts have jurisdiction to hear claims against counties, but tort claims have been generally unsuccessful because of the rule that counties are immune from liability for the torts of their agents and employees.

Comment, *The Governmental Immunity Doctrine in Texas — An Analysis and Some Proposed Changes,* 23 *SW. L.J.* 341, 344 (1969). After reviewing this analysis and other Texas authorities, one federal court concluded that "there is no jurisdictional obstacle to the maintaining of the suit against a Texas county. Articles 1572 and 1573 are held to be a legislative waiver of immunities from suit." *Adams v. Harris County,* 316 F. Supp. 938, 950 (S.D. Tex. 1970), *rev'd on other grounds,* 452 F.2d 994 (5th Cir. 1971),[8] *cert. denied,* 406 U.S. 968 (1972).

In *Galveston Gas* a claim was presented to the commissioner's court and rejected. The opinion recognized this fact,

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[6] See *TEX. R. CIV. P.* 94.

[7] *TEX. REV. CIV. STAT. ANN.* art. 1573 (Vernon 1962).

[8] The reversal was based on the fact that it was improper for the federal court's admiraltry jurisdiction to have been invoked under the facts of the case, a concern which in no way detracts from the authority of the quoted language.

and further noted that the taxes received were paid into the county, not the state, treasury. 54 Tex. at 290. Therefore, the county consented to the bringing of the refund action by the rejection of the claim, leaving it to a court of law to test the correctness of the taxpayer's allegations. *Cf. Angelina County v. Kent,* 374 S.W.2d 313, 317-18 (Tex. Civ. App. 1963).

With respect to the holding in *Crow,* it must at the outset be remembered that a declaratory judgment suit is most assuredly one against the state for which legislative permission must be obtained. *W.D. Hayden Co. v. Dodgen,* 158 Tex. 74, 77, 308 S.W.2d 838, 839 (1958). An earlier case correctly announced both the Texas rule and its exception: A declaratory judgment suit is not one against the state where it does not seek to impose liability on the state or compel the performance of a contract, nor is legislative permission required except where the suit is "in essence one for the recovery of money from the State or in which a judgment obtained would be satisfied by payment out of funds in the State treasury." *Cobb v. Herrington,* 144 Tex. 360, 365-66, 190 S.W.2d 709, 712 (1945).

It is important to keep in mind that the taxes exacted from the taxpayers in both *Crow* and *Galveston Gas* did not find their way into the state treasury, but were funds belonging, respectively, to a city and a county. Thus any judgment rendered was necessarily not one which would have been "satisfied by the payment out of funds in the State treasury."

Should Querner or Phillips pay the taxes which the collector has demanded, even under duress and protest, a suit for a refund of that portion of the taxes collected on behalf of

the state[9] would be one requiring legislative approval.[10] Although it would appear that the claims procedure discussed above could possibly provide a remedy against the county's portion of the collections, this would not be so with respect to the state's share.[11] Thus, any refund which might be available as to a portion of the taxes is non-statutory and must be fashioned from the common law.[12] Because of the uncertainty of the availability of a refund, there is clearly no adequate remedy afforded. *Procter & Gamble Distributing Co. v. Sherman,* 2 F.2d 165, 166 (S.D.N.Y. 1924).

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[9] The county tax assessor-collector also gathers tax revenues for the state as well as the county. *TEX. REV. CIV. STAT. ANN.* art. 7254 (Vernon 1960). The Notices of Levy make it clear that state taxes were also included in the alleged delinquency for which the seizure was conducted.

[10] In *Crow* the declaratory judgment action was appropriately brought because it sought to hold an ordinance unconstitutional. Such a suit does not impose liability on the governmental entity nor does it, without more, require the payment of any funds from public monies. In the present appeal, Phillips and Querner brought declaratory judgment suits against a state official in his elected capacity to declare the statute under which he seized their property unconstitutional. No party has suggested that this suit is one requiring prior legislative approbation inasmuch as it clearly falls within the recognized exception. But had these taxpayers sought a judment from the state treasury for taxes collected as a result of the seizure, legislative permission simply would have been required.

[11] As a further illustration of this principle, it should be noted that no refund procedure exists with respect to state ad valorem taxes collected by a county tax assessor-collector. *TEX. TAX.-GEN. ANN. ART.* 1.11A (Vernon 1969); *cf. id.* art. 1.05 (state property taxes not within class of taxes for which a refund action may be instituted).

[12] This is not a particularly easy task. It has been noted that "[t]here is no general statute applicable to property tax payments which makes provision for the payment of taxes under protest." 21 *TEXAS PRACTICE — PROPERTY TAXES,* § 622, at 733-34 (J. Howell ed., 1975). This is critical because those cases which have allowed a refund of other types of taxes have pointed out that there must be a payment under protest before an illegal tax can be refunded. "Texas courts are liberal in granting injunctions and strict in allowing refunds." *Id.* at 734.

The last case relied upon by the court below was added when the opinion was amended on rehearing. *State v. Lain,* 162 Tex. 549, 349 S.W.2d 579 (1961), adds nothing to the discussion. The suit was one to quiet title in land brought against the state and various state officials. The state was dismissed from the action on a plea of sovereign immunity and similar pleas filed by the individual state official defendants were denied. The court held that the individual defendants did not enjoy the state's sovereign immunity, and legislative permission to sue them was not required. *Id.* at 552, 349 S.W.2d at 581. Accordingly, this decision is not in point and has no bearing on the issue here presented.

None of the cases cited by the court below involve taxes collected by the state, save *Austin National Bank v. Shepard,* 123 Tex. 272, 71 S.W.2d 242 (1934), which involved franchise taxes collected pursuant to an unconstitutional statute. *Shepard* is of no assistance to the present problem since it involved an original mandamus proceeding in the supreme court against a state official. It has been well established that such a suit is not one against the state, and therefore requires no prior legislative permission. *Laidlaw Bros. v. Marrs,* 114 Tex. 561, 565, 273 S.W. 789, 792 (1925); *Jernigan v. Findley,* 90 Tex. 205, 211, 38 S.W. 24, 25 (1896); *Morris v. Smiley,* 378 S.W.2d 149, 151 (Tex. Civ. App. 1964).

The distinguisability of the court's authority is demonstrated by *National Biscuit Co. v. State,* 134 Tex. 293, 135 S.W.2d 687 (1940). The identical taxes involved in *Shepard* were once again before the court, but this time the suit was for a refund.[13] Nabisco was required and had first

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[13] In *Shepard* the legislature had already authorized a refund of the unconstitutional tax, the State Treasurer refused to honor a warrant for their refund to the bank. The mandamus proceeding was to compel Shepard to do his ministeral duty of paying the warrant.

obtained permission from the legislature before it instituted suit. *Id.* at 306, 135 S.W.2d at 693. If the theory advanced by the decision below could be correct, then legislative permission was superfluous in both *Nabisco* and *State v. Connecticut General Life Insurance Co.*, 382 S.W.2d 745 (Tex. 1964) (opinion commences, "With legislative permission. . ."). *See also Bullock v. Amoco Production Co.*, 606 S.W.2d 899, 901 (Tex. 1980) (various tax refund statutes "created a right not existing at common law"); *Texas International Airlines, Inc. v. Texas Alcoholic Beverage Comm'n* 566 S.W.2d 693, 696 (Tex. Civ App. 1974) (suit for refund, unless authorized by statute, requires legislative permission).

To the extent that the court below justified holding the tax seizure statute constitutional by speculating that a refund suit would be available, that court has rendered an impermissible advisory opinion. Its dicta has also ignored all previous Texas authority without attempting to overrule existing law. And since each of the cases relied upon are not in point, it cannot be seriously contended that Texas does, in fact, recognize the availability of a refund suit.

Even if a Refund Suit Could Be Brought, the Unreviewable Seizure Cuts Off The Valid Defense of Limitations.

In the suit filed against it by the appellees, Querner has interposed the defense of limitations. Suit was brought for taxes said to have been unpaid from 1960 until 1979, and it is clear that the collector "would certainly be unable to prevail at trial"[14] with respect to the years prior to 1975. But by instituting a summary seizure not subject to judicial review the collector has sought to sidestep the statute of limitations. It is apparent that the collector wants no part of a legal battle fought on level ground in which the taxpayer

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[14] *Commissioner v. Shapiro*, 424 U.S. 614, 633 (1976).

is free to assert its legitimate defenses. This is exactly the sort of oppressive and unconscionable tactic which this Court has found offensive to due process.

This very real danger is one of those which the opinion below fails to consider. Assuming for the moment that a refund suit could be fashioned from Texas common law, the taxpayer would not be able to recover all the taxes improperly collected. Under the approach adopted by the court below, the taxpayer would be required to pay all of the delinquent taxes claimed by the collector in order to regain its property and then sue for a refund. The taxpayer would be in the unenviable position of having to use the statute of limitations as a sword rather than a shield. Since it is not proper to use limitations offensively, a taxpayer such as Querner would be unable to recover its taxes for the years barred by limitations, even though the collector would have been unable to obtain a judgment for those same years if he had proceeded by judicial process rather than his own self-help remedy. Besides the obvious equal protection problem created by having unjustifiably disparate results,[15] any ultimate judicial determination of the refund action would be less than adequate. *Phillips v. Commissioner,* 283 U.S. 589, 597 (1931).

Were a Refund Suit Otherwise Available, It Could Not Constitute the Adequate Post-Seizure Review Required by Due Process.

The court below has correctly noted that, following a seizure for delinquent taxes, the "Collector must hold the property for ten days after seizure and then may sell the seized property at public auction." [J.S. App. 4a] Without completing its thought, that court has implied that a taxpayer should, after the seizure, pay the taxes claimed by the collector and then sue for a refund.

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[15] Cf. Mills v. Habluetzel,__U.S.____, 102 S. Ct. 1549, 71 L. Ed. 2d 770 (1982).

This begs the question. Such reasoning presupposes that the taxpayer will be in a position to raise, within ten days of the seizure, the funds necessary to redeem his property.[16] If he is not, he will lose his property and will recover only its dollar value if a refund action is successful.[17] Moreover, this reasoning overlooks the very real possiblility that the property sesized – as here – constitutes the operating assets of a business integral to that business' daily activities.[18] Both of these situations underscore the necessity for a prompt post-seizure review where there is no predeprivation judicial scrutiny of a proposed seizure.

What the court below has failed to consider is that some items of property which could be seized to satisfy a purported tax delinquency may be vital to the taxpayer. In a business context, a seizure of operating assets without the ability to promptly recover them could well lead to an injury which a successful refund suit could never recompense. It is easily foreseeable that the unreviewed taking of business equipment and its subsequent sale at public auction could lead to the laying off of some of the taxpayer's employees

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[16] Under the statutes here involved, there is no provision for the posting of a bond to replevy the seized property.

[17] Just as there is no statute providing for a refund of the taxes here involved, there is no provision for the recovery of interest on any overpayments. The nonavailability of interest was a concern of this Court (although it did not decide whether there was a constitutional right to recover interest) in *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 515 (1981). The failure to pay interest on taxes which have been illegally collected has been held to render the refund remedy inadequate. *E.g., United States v. Livingston*, 179 F. Supp. 9, 15 (E.D.S.C.) (three-judge court), *aff'd per curiam*, 364 U.S. 281 (1960); *Procter & Gamble Dist. Co. v Sherman*, 2 F.2d 165, 166 (S.D.N.Y. 1924). Additionally, the taxpayer would be unable to recover any of his consequential damages as part of the refund suit.

[18] Shaw seized two cranes belonging to the appellants and six van trailers owned by Querner.

and a severe negative impact on the taxpayer's business.[19] Given that it would necessarily require some period of time–perhaps years[20]–for a refund suit to be concluded, a taxpayer can well suffer severe injury as a direct result of the deprivation at issue long before there is an opportunity for judicial review. Under such circumstances, the collector would be able to put off his showing of "probable cause" until long after the seizure had taken place. If the seizure was in error, it would be some time before the taxpayer would be able to show it. The Constitution requires a more rapid review. *See North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 607 (1975).

In addition to a taxpayer losing his property without a *prompt* post-seizure review, a refund suit cannot properly substitute for that review because different issues would be involved. At a post-seizure hearing, the collector would be required to show that there was some reasonable basis in fact for his actions. *See Commissioner v. Shapiro*, 424 U.S. 614, 631 (1976). A refund suit, on the other hand, would place the burden on the taxpayer to show that taxes were not owing, at least not in the amount claimed by the collector. The opinion below thus shifts the burden of proof as to the propriety of the seizure from the collector to the taxpayer, and changes the issue to be reviewed from the correctness of the seizure to the merits of the dispute; this is simply not consistent with the concept of due process.

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[19] *Cf. Commissioner v. Shapiro*, 424 U.S. 614, 631 (1976), where this Court noted that "it is very doubtful that the need to collect the revenues is a sufficient reason to justify causing irreparable injury without a prompt post-seizure inquiry of any kind into the Commissioner's basis for his claim." Surely the adverse effects on a business are no less an irreparable injury than that found to exist in *Shapiro*.

[20] *Cf. Rosewell v. LaSalle National Bank*, 423 U.S. 503, 519-520 (1981). Mr. Justice Brennan, concurring in *Laing v. United States*, 423 U.S. 161, 187 (1976), questioned whether a denial of a taxpayer's forum for review for up to 60 days was consistent with the due process requirement of a prompt post-seizure review.

CONCLUSION

For these reasons, the amicus curiae agrees with the appellants that this Court should note probable jurisdiction and reverse the judgment of the court below.

Respectfully submitted,

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